SUPREME COURT, U. S.

FILED

NOV 1 19

MICHAEL RODAK, JR., C

IN THE

# Supreme Court of the United States

**October Term, 1974.**

No. 74—376

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY, and JAMES C. TRASK,

*Petitioners,*

*v.*

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

*Respondent.*

**Brief of Respondent in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Third Department.**

A. EDWARD HILL,
*Attorney for Respondent,*
724 Security Mutual Bldg.,
Binghamton, N. Y. 13901

HINMAN, HOWARD & KATTELL,
*Of Counsel,*
724 Security Mutual Building,
Binghamton, N. Y. 13901

SHAW, ESWORTHY, O'BRIEN & CROWLEY,
*Of Counsel,*
123 Front Street,
Binghamton, N. Y. 13905

## Table of Contents.


| | Page |
|---|---|
| Questions Presented | 1 |
| Statement of the Case | 2 |
| ARGUMENT: | |
| POINT I. The Supreme Court lacks jurisdiction under 28 U.S.C. 1257 (3) to review this case | 6 |
| A. The orders of the state courts do not fall within the standards of "finality" as enunciated by this Court | 6 |
| B. Pursuant to provisions of the New York Civil Practice Law and Rules, Petitioners would have further recourse to the state courts of New York, and, therefore, should not have petitioned the United States Supreme Court for a writ of certiorari until a "final" judgment and exhaustion of their state remedies | 13 |
| POINT II. The controversy between Petitioners and Respondent is moot and therefore not reviewable in this Court | 15 |
| POINT III. Petitioners have failed to present any issue with respect to violation of the First and Fourteenth Amendments to the United States Constitution worthy of review by this Court | 20 |
| A. The protection of the constitutional right of free speech does not extend to speech used ancillary to and in support of conduct which is intended to prevent effectuation of a valid state law | 20 |

Page

B. The *Ex Parte* order issued below did not violate Petitioners' right of due process ..... 25

Conclusion ..... 28

APPENDIX ..... 29

## TABLE OF CASES.

Adderley v. Florida, 385 U. S. 39 (1966) ..... 24

Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza, 391 U. S. 308 (1968) ..... 9

Board of Education v. Teachers Local 886, 46 Ill. 2d 439, 264 N. E. 2d 18 (1970), cert. den. 403 U. S. 904 (1971) ..... 25

Bond Stores, Inc. v. Turner, 262 App. Div. 417, 29 N. Y. S. 2d 82 (3rd Dep't. 1941) ..... 9

Carroll v. Commissioners of Princess Anne, 393 U. S. 175 (1968) ..... 18, 19, 25

Central Hardware Co. v. NLRB, 407 U. S. 539 (1972) 23

City of New York v. DeLury, 23 N. Y. 2d 175, 295 N. Y. S. 901, 243 N. E. 2d 128 (1968) ..... 27

Cox v. Louisiana, 379 U. S. 536 (1965) ..... 24

Dause v. Bates, 369 F. Supp. 139 (W.D. Ky. 1973) .... 23

DeFunis v. Odegaard, 94 S. Ct. 1704 (1974) ..... 16

Druggan v. Anderson, 269 U. S. 36 (1925) ..... 27

Duryea v. Averbach, 164 App. Div. 44, 149 N. Y. S. 2d 432 (2nd Dep't. 1914) ..... 14

Page

Eidelberg v. Steinberg, 6 A. D. 2d 895, 177 N. Y. S. 2d 544 (2nd Dep't. 1958) ..... 14

Georgia Railway Power Co. v. Decatur, 262 U. S. 432 (1923) ..... 8

Gibbons v. Ogden, 19 U. S. (6 Wheat) 448 (1821) ..... 8

Giboney v. Empire Storage & Ice Co., 336 U. S. 490 (1949) ..... 21, 24

Gospel Army v. Los Angeles, 331 U. S. 543 (1947) ..... 7

Heublein, Inc. v. R. H. Macy and Co., Inc., 25 A. D. 2d 825 (1st Dep't. 1966) ..... 14

Laborer's Local 438 v. Curry, 371 U. S. 542 (1963) ..... 11

Lloyd Corp. v. Tanner, 407 U. S. 551 (1972) ..... 23

Montgomery Building and Construction Trades Council v. Ledbetter Erection Company, Inc., 344 U. S. 178 (1952) ..... 11, 12

Motor Coach Employees v. Missouri, 374 U. S. 74 (1963) ..... 18

Musser v. Sheppard, 299 U. S. 513 (1936) ..... 8

North Dakota Pharmacy Board v. Snyder's Stores, 94 S. Ct. 407 (1973) ..... 7

Oilworkers Unions v. Missouri, 361 U. S. 363 (1960) 18

Organization for a Better Austin v. Keefe, 402 U. S. 415 (1971) ..... 9, 15

Rankin v. Shanker, 23 N. Y. 2d 111, 295 N. Y. S. 2d 625, 242 N. E. 2d 802 (1968) ..... 26

Page

Richfield Oil Corporation v. State Board of Equalization, 329 U. S. 69 (1946) ..... 7

State v. Fuller, 31 A. D. 2d 71, 296 N. Y. S. 2d 37 (2nd Dep't. 1968) ..... 27

Super Tire Engineering Co. v. McCorkle, 94 S. Ct. 1694 (1974) ..... 18

Teamsters Local 695 v. Vogt, 354 U. S. 284 (1957) 22, 23, 24

Thornhill v. Alabama, 310 U. S. 88 (1940) ..... 21

Town of Albion v. Ryan, 201 App. Div. 717, 194 N. Y. S. 261 (4th Dep't. 1922) ..... 14

Walker v. Birmingham, 388 U. S. 307 (1967) ..... 19, 20

STATUTES.

United States Constitution

First Amendment ..... 10

Fourteenth Amendment ..... 10

28 United States Code

Section 1257 (3) ..... 6, 8, 11

New York Civil Practice Law and Rules

Section 5704 ..... 28

Section 6301 ..... 27

Section 6314 ..... 13, 28

New York Civil Service Law

Section 210 (1) ..... 2, 17, 22

Section 211 ..... 26

In The

# Supreme Court of the United States

October Term, 1974.

No. 74-376.

---

Susquehanna Valley Teachers' Association, New York Congress of Teachers, Lynn H. Blanton, Patrick Tracy, Margaret Mulford, Thomas Malloy, and James C. Trask,

*Petitioners,*

*v.*

Central School District No. 1 of the Towns of Conklin, Binghamton, Kirkwood and Vestal, Broome County, New York,

*Respondent.*

---

**Brief of Respondent in Opposition to Petition, for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Third Department.**

## Questions Presented.

1. Does the Supreme Court have jurisdiction to review this case?

(a) Is the Order of the State Appellate Court *final?*

(b) Have Petitioners exhausted their remedies in the State courts?

2. Is the controversy between Petitioners and Respondent moot and, therefore, not subject to review in this Court?

3. Were Petitioners' rights under the First and Fourteenth Amendments of the United States Constitution violated by the *ex parte* temporary restraining order and preliminary injunction, which prohibited certain conduct ancillary to and in support of an illegal strike on the school grounds?

## Statement of the Case.

> No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.
>
> N. Y. Civil Service Law §210(1).

In the Fall of 1972, Respondent school district was charged with the responsibility of educating approximately 3,400 students from elementary through senior high school grades. The system functioned in five different school buildings, three elementary, one junior high and one senior high. The district comprised approximately sixty-five square miles. A total of 182 professionals were employed by Respondent, 160 of which were classified as classroom teachers. The individual Petitioners were and still are teachers in the system (Record, pp. 22, 23).

Negotiations for a collective bargaining agreement were pending between Petitioners and Respondent at the opening of the school year in September, 1972. On October 6, 1972, 130 of the teachers absented themselves from their classrooms without legal excuse and, between 7:00 a. m. and 6:00 p. m., proceeded to walk in front of the doorways and on the sidewalks and roadways adjacent to the schools. Most of the teachers were carrying signs (Record, pp. 28, 40).

The vice principal of the school district testified at a later hearing that, when the picketing was first observed, teachers were parading in large numbers in front of entrance doors to the senior high school, carrying posters or signs and making a circular marching line in front of the entrances. When the buses arrived, the pupils were held on the buses and the administration instructed the drivers to take the children home and not to pick up any other pupils. The schools did not open on that day (Record, pp. 52, 53).

October 6th was a Friday and the schools were not open on October 9th, the following Monday, because of a legal holiday. The schools were all closed on October 10th, to give the administration an opportunity to attempt to train substitute teachers. On that day, they discovered that keys had been taken or misplaced, equipment, such as bulbs for projectors, was missing, and class books could not be located (Record, pp. 22, 28, 29, 38).

When the schools were reopened on October 11th, the marching and picketing continued, and the vice principal observed teachers carrying signs and walking as close as ten to fifteen feet from classroom windows (Record, p. 54).

Under the authority of the New York State Civil Service Law (popularly known as the "Taylor Law") Respondent obtained an *ex parte* order to show cause, with temporary restraining order, which was signed and entered on October 11, 1972, by a New York State Supreme Court Justice (Appendix I, Petitioners' Brief, at 50). The order provided for a hearing, seven days thereafter, on October 18, 1972, to entertain arguments as to whether a preliminary injunction should be granted to Respondent,

enjoining Petitioners from engaging in a strike which Petitioners admit was illegal under the Civil Service Law, and from marching and picketing. The temporary restraining order prohibited Petitioners from striking,

> from marching on the schoolgrounds of said school district during normal class hours, 7:45 a. m. to 3:35 p. m. on Monday through Friday; from intimidating, coercing or in any way interfering with the free passage of other persons not engaged in said strike from passing at will freely and without interference to and from the school buildings of said school district; from contacting in person or by phone those persons employed by the district or who voluntarily or otherwise are assisting Plaintiff in carrying out its lawful duties of maintaining school, pending the argument of this motion.

On October 13, Petitioners obtained an order to show cause why the order granting the temporary restraining order should not be vacated, which was returnable on October 18, the date scheduled for the injunction hearing. In the affidavits accompanying their show cause order, Petitioners stated that their First and Fourteenth amendment rights had been violated (Appendix J, Petitioners' Brief, at 53). The striking, marching and picketing continued on October 13, 16 and 17 (Record, pp. 28, 40).

Throughout the first days of the strike and as a result of the picketing, Respondent experienced difficulty in the delivery of milk and bread. On one occasion, a boiler repairman refused to enter the building to make an emergency repair until his union superior was finally persuaded to let him cross the picket line (Record, p. 55). The administration was unable to obtain deliveries of gas and oil to their physical plants during normal workday hours (Record, p. 57).

At the hearing, Respondent called five witnesses and introduced in evidence professional photographs and a motion picture, tending to prove the existence of the strike, marching and picketing. Petitioners called no witnesses.

When the evidence was closed, the court entertained oral motions and then issued a decision from the bench, denying Petitioners' motion to vacate the *ex parte* order and temporary restraining order. In the process of deciding Petitioners' motion to vacate the temporary restraining order, the court asked counsel: "Wouldn't it be a matter of common sense that it was incidental to the strike?" The court was referring to the conduct of picketing, marching, etc., which is at issue herein (Record, p. 5). The court further granted a "temporary" (preliminary would be the technically proper word) injunction against Petitioners, prohibiting them from striking and engaging in other specified ancillary conduct.

The order of October 19 giving effect to the preliminary injunction prohibited the Petitioner teachers:

> From marching, and from picketing on the school grounds of the Plaintiff's School District on Monday through Friday from 7:45 a. m. to 3:35 p. m.; from intimidating, coercing or in any way interfering with the free passage of students and other persons not engaged in striking from passing at will freely and without interference to and from the school buildings of the said Plaintiff's School District; from coercing in person or by phone those persons employed by the District or who voluntarily or otherwise are assisting the Plaintiff School Board in carrying on its lawful duties of maintaining school (Appendix F, Petitioners' Brief, at 37).

On or about November 1, Petitioners executed a contract with Respondent and the teachers all returned to work on November 2. Although these facts do not appear in the record, they are submitted by Respondent in support of its contention that the matter is moot (Point II, below).

Petitioners then appealed to the Appellate Division, Third Department, New York State Supreme Court, from so much of the order of Justice Brink which granted the motion for a preliminary injunction (Petitioners' Brief, at 42). Prior to taking the appeal to the Appellate Division, Petitioners never made a motion in any State Court to vacate the preliminary injunction.

Petitioners then attempted to seek leave to appeal to the Court of Appeals of the State of New York but permission was denied by the Appellate Division.

A subsequent motion addressed directly to the Court of Appeals was dismissed "upon the ground that the order sought to be appealed from *does not finally determine the action* within the meaning of the constitution." (Emphasis supplied.) (Petitioners' Brief, at 31.)

## ARGUMENT.

## POINT I.

### The Supreme Court lacks jurisdiction under 28 U.S.C. 1257 (3) to review this case.

#### A. The orders of the state courts do not fall within the standards of "finality" as enunciated by this Court.

In determining the "finality" of judgments for purposes of review, this Court has *frequently stated* the following rule:

> [F]or a judgment of an appellate court to be final and reviewable for this purpose, it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entertaining the judgment which the appellate court • • • directed.' *Department of Banking v. Pink*, 317 U. S. 264, 267, • • •.
> *Gospel Army v. Los Angeles*, 331 U. S. 543 (1947) at 546.

See also *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69 (1946).

Although this Court has stated that it will look beyond the "face of the judgment" to determine whether the state court proceeding was final, Respondent will show that the state court orders in this case clearly lack this vital element (*Gospel Army, id.* at 548).

In dismissing Petitioners' motion for leave to appeal, the New York Court of Appeals stated (Petitioners' Brief for Certiorari at 30):

> That the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

That statement leaves no doubt that the order for which Petitioners seek certiorari lacked finality under the court's definition of the term. Indeed, this record will be searched in vain for any "judgment," as that term is understood in common practice. All of the state court rulings were effectuated by intermediate orders.

In a recent decision, *North Dakota Pharmacy Board v. Snyder's Stores*, 94 S. Ct. 407 (1973), this Court stated at 410:

The finality requirement of 28 U. S. C. Section 1257 (28 U. S. C. S. Section 1257) which limits our review of state court judgments serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

Respondent submits that a grant of certiorari in this case would be in derogation of each of the foregoing criteria. First, Petitioners' attack is focused upon a temporary restraining *order* of October 11th, 1972, issued by a motion term judge, and an *order* of the same court, dated October 19th, 1972, which granted a *preliminary* injunction. Second, as is discussed in Point II, there is no longer any real "case" or "controversy" "in the sense of Article III," since Petitioners have since entered into a collective bargaining agreement and returned to work. Third, Petitioners should have obtained that type of state court determination which is based upon the state's own purposeful, appellate "sifting" process before attempting to present Federal questions to this tribunal.

This Court in the past has held the granting of a preliminary injunction or interlocutory order to be non-final for purposes of review under 28 U. S. C. §1257. *Gibbons v. Ogden*, 19 U. S. (6 Wheat.) 448 (1821); *Georgia Railway Power Co. v. Decatur*, 262 U. S. 432 (1923); *Musser v. Sheppard*, 299 U. S. 513 (1936).

While, on occasion, the Court has held the granting or denial of an injunction to be final for purposes of review, Respondent submits that this case does not fall within any of the recognized exceptions.

In *Organization for a Better Austin v. Keefe*, 402 U. S. 415 (1971), the Court, in a footnote, dealt briefly with the question of its power to review a "temporary injunction" issued against defendants, enjoining them from the distribution of leaflets. The Court stated, at 402 U. S. 418, that nothing in the record

> would indicate that the Illinois courts applied a less rigorous standard in issuing and sustaining this injunction than they would with any permanent injunction in the case. Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing. Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality. Moreover, the temporary injunction here, which has been in effect for over three years, has already had marked impact on Petitioners' First Amendment rights.

In contrast, under the law of New York State, the granting of a temporary injunction does not decide the question as to plaintiff's right to a permanent injunction, although it is a factor to be considered. As stated by the appellate division in *Bond Stores, Inc., v. Turner*, 262 App. Div. 417, 29 N. Y. S. 2d 82 (3rd Dept. 1941), a case which has been cited as the law of the State:

> [T]he granting of a temporary injunction does not decide the question as to plaintiff's right to a permanent injunction. The temporary injunction merely maintained the *'status quo'* until the merits of the case might be passed upon. The parties should have their day in court as to those merits. 262 App. Div. 417, 419; 29 N. Y. S. 2d 82, 84.

In *Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza*, 391 U. S. 308 (1968), the Court was

asked to consider whether a state court's injunction of peaceful picketing as a trespass was violative of Petitioner's rights under the First and Fourteenth Amendments of the U. S. Constitution. In dealing with the question of the nature of the injunction, the Court stated at 391 U. S. 312, n. 5:

> We need not concern ourselves with deciding whether the injunction is to be characterized as permanent or temporary. Since the order provides in terms that it shall remain in effect until further modification by the court and since there is no indication that any modification affecting the issues presently before us will be forth-coming at any time in the near future, the judgment below upholding the issuance of the injunction is clearly final for purposes of review by this Court. Compare *Construction Laborers' Local 438 v. Curry*, 371 U. S. 542, 9 L. Ed. 2d 514, 83 S. Ct. 531 (1963).

In the present case, the order (printed in Petitioners' Brief for Certiorari, at 39) specifically states:

> That *pending the final determination of this action*, the court hereby grants a temporary injunction against the Susquehanna Valley Teachers' Association * * * (Emphasis supplied.)

As the discussion in Point IB indicates, under the law of New York State, Petitioners had recourse to obtain either a final determination of this matter or, in the alternative, to have the temporary injunction vacated on the grounds of lack of prosecution. We submit, therefore, that the order not only lacks "finality" for purposes of review by this Court, but also that Petitioners still have available remedies in the state courts of New York.

To further support this contention Respondent refers to two other cases involving preliminary injunctions. In

*Montgomery Building and Construction Trades Council v. Ledbetter Erection Company, Inc.*, 344 U. S. 178 (1952), the Court dismissed a writ of certiorari improvidently granted to review a "temporary injunction," stating at 344 U. S. 181-182:

> True, as long as a temporary injunction is in force, it may be as effective as a permanent injunction, and for that reason appeals from interlocutory judgments have been authorized by state legislatures and Congress. But such authorization does not give interlocutory judgments the aspect of finality here, even though we may have inadvertently granted certiorari * * *.
>
> It is argued that if this is not held to be a final decree or judgment and decided now, it may never be decided, because to await the outcome of the final hearing is to moot the question and to frustrate the picketing. *However appealing such argument may be, it does not warrant us in enlarging our jurisdiction.* Only Congress may do that. *Furthermore, the interlocutory decree could have been readily converted into a final decree, and the appeal could have proceeded without question as to jurisdiction just as effectively and expeditiously as the appeal from the interlocutory injunction was pursued in this case.* (Emphasis supplied.)

In *Laborer's Local 438 v. Curry*, 371 U. S. 542 (1963), the Court held that the Georgia State courts lacked jurisdiction to consider the application for a temporary injunction because the activities involved were within the exclusive jurisdiction of the N.L.R.B. In discussing the "finality" requirement of 28 U. S. C. §1257, the Court said, at 371 U. S. 550 and 552:

> The policy of 28 U. S. C. §1257 against fragmenting and prolonging litigation and against piecemeal reviews of state court judgments does not prohibit our holding the decision of the

> Georgia Supreme Court to be a final judgment, particularly when postponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard *by the National Labor Relations Board, not by the state courts* * * *. (Emphasis supplied.)
>
> There remains the matter of *Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co.*, 344 U. S. 178, 97 L. Ed. 204, 73 S. Ct. 196, where the Court applied the salutary and long-standing rule that decisions upon interlocutory injunctions are not final judgments. *Ledbetter*, of course, was decided before *Garner v. Teamsters, C. & H. Local Union*, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161, and subsequent pre-emption cases in this Court, and at a time when the respective jurisdiction of the National Labor Relations Board and the state courts was a much mooted issue * * *.
>
> In any event, however, to the extent that *Ledbetter* may be said to prohibit our review of a final and erroneous assertion of jurisdiction by a state court to issue a temporary injunction in a labor dispute, when a substantial claim is made that the jurisdiction of the state court is pre-empted by federal law and by the exclusive power of the National Labor Relations Board, we decline to follow it.

The above-quoted language establishes that *Ledbetter* remains controlling in the present case. The temporary injunction in the case at bar does not arise within the framework of a labor dispute governed by federal law. Consequently, a refusal by this Court to review the case would not erode, or affect in any manner, the national labor policy which was relevant in *Curry, supra.*

**B. Pursuant to provisions of the New York Civil Practice Law and Rules, Petitioners would have further recourse to the state courts of New York, and, therefore, should not have petitioned the United States Supreme Court for a writ of certiorari until a "final" judgment and exhaustion of their state remedies.**

Article 63 of the Civil Practice Law and Rules of New York contains detailed, extensive provisions regarding the issuance of preliminary injunctions and temporary restraining orders. Section 6314 specifically sets forth a procedure for motions to vacate or modify such orders (Respondent's Appendix, 29). While a motion under CPLR 6314 to vacate a preliminary injunction is addressed to the discretion of the court, New York State case law establishes many grounds upon which the court will entertain such a motion.

Petitioners did obtain an order to show cause to vacate Respondent's *ex parte* temporary restraining order and to dismiss the complaint which was heard on October 18, 1972, the date on which the hearing for the preliminary injunction was also held. The lower court denied that motion. However, Petitioners never moved to vacate or modify the preliminary injunction, pursuant to the established procedural laws of New York State.

As stated in a recognized treatise on procedure, 7A Weinstein-Korn-Miller, *New York Civil Practice,* Paragraph 6314.08 (1973 Rev.) at page 63-169:

> In many instances, the defendant will not be entitled to a vacation of the injunction or restraining order but will be entitled to partial relief, which will take the form of a modification. One situation in which this type of relief will be appropriate is when the plaintiff has shown a need

> for a preliminary injunction but not for a preliminary injunction that is as broad as the injunction actually issued.

See *Town of Albion v. Ryan,* 201 App. Div. 717, 194 N. Y. S. 261 (4th Dept. 1922); *Eidelberg v. Steinberg,* 6 A. D. 2d 895, 177 N. Y. S. 2d 544 (2nd Dept. 1958). In *Heublein, Inc., v. R. H. Macy and Co., Inc.,* 25 A. D. 2d 825 (1st Dept. 1966), the Appellate Division stated:

> Independent of any reservation or fixing of conditions in the temporary injunction order, the power is expressly conferred upon the court to vacate or modify the order upon a change of circumstances (CPLR 6314), * * * Any application to vacate or modify the order should be considered and determined in light of all the circumstances then existing and after full opportunity of the parties to be heard thereon, and we conclude that it was improper now to particularize conditions which could have the effect of foreclosing or improperly influencing the future exercise of the court's discretion. *In the meantime, the parties should press for an early trial.* (Emphasis supplied.)

As an alternative to moving for *modification,* as pointed out by the above-quoted court, petitioners had the option of moving to *vacate* the preliminary injunction or to serve an answer and file a note of issue to have the case determined on the merits. As stated by the Appellate Division in *Duryea v. Auerbach,* 164 App. Div. 44, 149 N. Y. S. 432 (2nd Dept. 1914), a case frequently cited for the following proposition:

> The general rule in this court is not to disturb this kind of an order [an injunction *pendente lite*]. (* * * citing cases * * *) On the other hand, the plaintiff, having thus halted the defendants, should not be allowed to rest. And if he is not ready for

> trial at the first possible moment, the defendant should be heard for a vacation of this order, which is now affirmed, * * *

Unlike the injunctions which this court was asked to consider in *Organization for a Better Austin v. Keefe, supra,* and *Logan Valley, supra,* the injunction in this case was clearly a temporary injunction, "pending the final determination of this action" (Order of October 19, 1972, Petitioners' Brief for Certiorari at 39). In contrast to the injunction in the *Logan Valley* case, *supra,* this order did not specifically provide that it would remain in effect until further modification. And, as above indicated, the refusal of the Court of Appeals of New York State to hear argument on the merits of this case was premised "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution" (Petitioners' Brief for Certiorari at 30).

Respondent therefore submits that the order which Petitioners now ask the Supreme Court to void lacks "finality" for purposes of review under 28 U. S. C. §1257, and that Petitioners have failed to pursue available state court remedies.

## POINT II.

### The controversy between Petitioners and Respondent is moot and therefore not reviewable in this Court.

The activities of Petitioners, which provoked the orders which they now challenge, arose on October 6, 1972, when they commenced their strike, in violation of the New York Civil Service Law. The strike terminated on November 1, 1972, when a collective bargaining agreement

was entered into between the Susquehanna Valley Teachers' Association and the Respondent. The teachers returned to work on November 2, 1972, and have continued to work since that date.

In light of the execution of the collective bargaining agreement, and the teachers' return to work approximately two years ago, Respondent contends that the case is moot and should not be considered by the Court.

The Court has consistently applied the principle "that federal courts are without power to decide questions that cannot affect the rights of the litigants before them." *DeFunis v. Odegaard,* 94 S. Ct. 1704 at 1705 (1974). In *DeFunis,* the Court concluded at 1706:

> DeFunis did not cast his suit as a class action, and the only remedy he requested was an injunction commanding his admission to the Law School. He was not only accorded that remedy, but he now has also been irrevocably admitted to the final term of the final year of the Law School course. The controversy between the parties has thus clearly ceased to be 'definite and concrete' and no longer 'touches the legal relations of parties having adverse legal interests'.

There is no longer any controversy between the parties involved in this litigation. The underlying dispute involved the parties' efforts to negotiate a collective bargaining agreement covering the terms and conditions of employment for the teachers in the Susquehanna Valley Central School District. Such an agreement was reached, and on November 2, 1972, the teachers returned to work.

The Court in *DeFunis* also concluded:

> It might also be suggested that this case presents a question that is 'capable of repetition, yet evading

> review' (citations omitted), and is thus amenable to federal adjudication even though it might otherwise be considered moot. But *DeFunis* will never again be required to run the gantlet of the Law School's admissions process, and so the question is clearly not 'capable of repetition' so far as he is concerned. Moreover, just because this particular case did not reach the Court until the eve of the petitioner's graduation from law school, it hardly follows that the issue he raises will in the future evade review. If the admissions procedures of the Law School remain unchanged, there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court, now that the Supreme Court of Washington has spoken. This case, therefore, in no way presents the exceptional situation in which the *Southern Pacific Terminal* doctrine might permit a departure from 'the usual rule in federal cases * * * that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated'. (Citations omitted.) 94 S. Ct. at 1707.

The same rationale applies in the present case. The situation which existed in 1972 is not "capable of repetition" unless Petitioners engage in another illegal strike. The New York Civil Service Law continues to prohibit strikes by public employees. Civil Service Law, Sec. 210(1). In the absence of an illegal strike, the issue will never recur. In a case involving a labor dispute this Court has stated:

> The decision we are asked to review upheld only the validity of an injunction, an injunction that expired by its own terms more than three years ago. Any judgment of ours at this late date "would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond

> recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain". (Citation omitted.) *Oil Workers Unions v. Missouri*, 361 U. S. 363 (1960) at 371.

The importance of the existence of a continuing dispute has been consistently recognized by the Court. In *Motor Coach Employees v. Missouri*, 374 U. S. 74 (1963), the Court held that the issue was not moot because the labor dispute remained unresolved.

The same principle was confirmed in *Carroll v. Commissioners of Princess Anne*, 393 U. S. 175 at 178 (1968). In that case the Court cited *Motor Coach Employees v. Missouri, supra*, and stated:

> • • • [A]lthough the seizure (of the bus company by the State of Missouri) had been terminated, the case was not moot because "the labor dispute (which gave rise to the seizure) remains unresolved. There thus exists • • • not merely the speculative possibility of invocation of the (seizure law) in some future labor dispute, but the presence of an existing unresolved dispute which continues • • •."

In *Super Tire Engineering Co. v. McCorkle*, 94 S. Ct. 1694 (1974), the Court held that the issue was not moot even though the labor dispute had been resolved, because a state statute immediately and directly continued to affect the bargaining relationship of the parties.

In the case at bar, however, the labor dispute has been resolved by the execution of a collective bargaining agreement which became effective on November 2, 1972. Moreover, since Petitioners concede that their strike was unlawful, there is here no challenged state statute which continues to affect the bargaining relationship of the parties. Consequently, Petitioners' claim involves not an actual

controversy, but only a speculative possibility that they would again violate the statute.

Another important factor in *Carroll v. Commissioners of Princess Anne, supra,* was specifically pointed out by the Court concerning the issue of mootness. The Court stated:

> We agree with petitioners that the case is not moot. Since 1966, petitioners have sought to continue their activities, including the holding of rallies in Princess Anne and Somerset County, and it appears that the decision of the Maryland Court of Appeals continues to play a substantial role in the response of officials to their activities.
>
> • • • This conclusion—that the question is not moot and ought to be adjudicated by this Court—is particularly appropriate in view of this Court's decision in *Walker v. Birmingham,* 388 U. S. 307 (1967). In that case, the Court held that demonstrators who had proceeded with their protest march in face of the prohibition of an injunctive order against such a march, could not defend contempt charges by asserting the unconstitutionality of the injunction. *The proper procedure, it was held, was to seek judicial review of the injunction and not to disobey it, no matter how well founded their doubts might be as to its validity.* Petitioners have here pursued the course indicated by *Walker;* and in view of the continuing vitality of petitioners' grievance, we cannot say that their case is moot. 393 U. S. at 178-179. (Emphasis supplied.)

In the case at bar, the state court orders ceased to have an effect upon the Petitioners on November 2, 1972, when the teachers returned to work. More importantly, notwithstanding this Court's decision in *Walker v. Birmingham, supra,* Petitioners in this case disobeyed the temporary restraining order and the preliminary injunction and continued, until November 2, 1972, to participate in the

illegal strike and the related activities which were an integral part of the illegal strike. In summary, none of the circumstances which enhanced the position of petitioners in *Carroll* are present in this case. The action by Respondent was necessitated by Petitioners' violation of New York law; and Petitioners then disobeyed two orders of the New York Supreme Court for a period of approximately nineteen days.

Unlike the petitioners in *Carroll,* Petitioners here did not "pursue the course indicated by *Walker v. Birmingham*", and for that reason together with the fact that the underlying dispute was resolved approximately two years ago, the case should be considered moot.

## POINT III.

**Petitioners have failed to present any issue with respect to violation of the First and Fourteenth Amendments to the United States Constitution worthy of review by this Court.**

**A. The protection of the constitutional right of free speech does not extend to speech used ancillary to and in support of conduct which is intended to prevent effectuation of a valid state law.**

Petitioners contend that the *ex parte* temporary restraining order and the order granting a preliminary injunction abridged their right of free speech. In particular, they contend that such orders were overly broad in that they not only enjoined unlawful activity but also enjoined speech used ancillary to and in direct support of such unlawful activity. Respondent respectfully submits that this claim is wholly specious.

In support of their claim, Petitioners note that picketing, as a mode of free speech, was approved in *Thornhill v. Alabama,* 310 U. S. 88 (1940). However, they fail to cite subsequent decisions of this Court which have significantly limited *Thornhill's* general pronouncements.

In *Giboney v. Empire Storage & Ice Co.,* 336 U. S. 490 (1949), for example, the Court was presented with questions concerning the constitutional power of a state to apply its antitrade restraint law to labor union activities, and to enjoin union members from peaceful picketing carried on as an essential and inseparable part of a course of conduct which was in violation of a state law. In affirming an order of the lower court enjoining peaceful picketing, this Court rejected the notion that constitutional freedom of speech extends to speech used as an integral part of conduct in violation of a valid criminal statute. In balancing the state interest with the essential importance of free speech, this Court, speaking through Mr. Justice Black, stated at 336 U. S. 592:

> • • • The placards were to effectuate the purposes of an unlawful combination, and their sole, unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers. It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed. (Citations omitted.) Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

Noting that the petitioners would succeed in making the state policy a dead letter, unless restrained, this Court ruled that picketing could be regulated or prohibited to the extent that it forms an essential part of a course of conduct which the state can regulate or prohibit.

In *Teamsters Local 695 v. Vogt,* 354 U. S. 284 (1957), the Court broadened its holding in *Giboney, supra,* by ruling that a state may enjoin peaceful picketing where such conduct is in violation of a valid policy of the state. In that case, the Court was asked to rule on the constitutionality of an order enjoining peaceful picketing, where such conduct was engaged in for the purpose of coercing an employer to interfere with its employees in their right to join or refuse to join a union. Such interference on the part of an employer was barred by a valid state statute.

The Court reviewed a line of its post-*Thornhill* decisions, observing that even peaceful picketing is subject to proper state regulation.

> This series of cases, then, established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy. 354 U. S. 284 at 293.

In the case at bar, Petitioners have not challenged Section 210(1) of the New York Civil Service Law which provides:

> No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.

No party here denies that Petitioners, individually and jointly, engaged in picketing ancillary to and in direct support of a strike in violation of that statute. In view of the *Vogt* case, *supra,* it is clear that picketing and other conduct, aimed at preventing effectuation of a valid state law, may be enjoined. See, also, *Central Hardware Co. v. N.L.R.B.,* 407 U. S. 539 (1972), and *Lloyd Corp. v. Tanner,* 407 U. S. 551 (1972). Indeed, since the conduct ceased when Petitioners ended their unlawful strike, thereby leaving no doubt that such conduct was an integral and inseparable part of the strike, Respondent contends that the picketing and other conduct could be enjoined under the narrower *Giboney* holding.

Nevertheless, Petitioners, relying on *Dause v. Bates,* 369 F. Supp. 139 (W. D. Ky. 1973), and the cases cited therein, contend that the orders issued below violated their constitutional right of free speech. Such reliance is misplaced. In the *Dause* case, *id.,* three principals and four teachers were demoted or terminated allegedly because they supported a teachers' strike which was later found to be unlawful by the Kentucky Court of Appeals. However, none of the principals went out on strike nor were any of the plaintiffs engaged in picketing or coercion. Also, three of the teachers were found to have been terminated for reasons unrelated to the strike. With respect to the remaining four, the court found that they were *demoted or discharged because of their comments or writings in support of the strike* and held that such action violated their constitutional right of free speech.

Unlike the circumstances in the *Dause* case, *id.,* Petitioners herein participated in a strike that was clearly prohibited by statute. In addition, Petitioners engaged in picketing and other conduct in direct support of that strike. In spite of this, Respondent did not prevent any of the Petitioners employed by it from returning to their

regular duties when the collective bargaining agreement was executed.

This Court has long held that picketing cannot be equated with "pure speech". In *Cox v. Louisiana,* 379 U. S. 536 (1965), for example, the Court stated at 555:

> We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.

Similarly, in *Adderley v. Florida,* 385 U. S. 39 (1966), the Court stated at 47-48:

> • • • there is no merit to petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this "area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate • • •" Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, • • • We reject it again.

In view of the holdings in *Giboney, Vogt, Cox, and Adderly,* Respondent contends that the constitutional right of free speech cannot be used by Petitioners as a cloak for speech used in support of and as an inseparable part of an unlawful strike.

**B. The *Ex Parte* order issued below did not violate Petitioners' right of due process.**

Petitioners claim that the *ex parte* order issued below violates their right of due process under the Fourteenth Amendment. In support of this contention, Petitioners rely primarily upon *Carroll v. Commissioners of Princess Anne,* 393 U. S. 175 (1968), *supra,* in which this Court held that an *ex parte* order restraining petitioners for ten days from holding rallies or meetings in the county was unconstitutional. That case involved a planned rally where political speeches were to be delivered. Since a rally held by petitioners on the prior day aroused considerable unrest, the lower court issued an *ex parte* order restraining petitioners from holding any other rallies or meetings for ten days. Petitioners obeyed the order.

Unlike the *Carroll* case, the case at bar involved picketing and other conduct in support of an illegal strike. As already noted in *Cox, supra,* and *Adderly, supra,* picketing cannot be equated with the pure speech involved in *Carroll.* In addition, Respondent demonstrated to the satisfaction of both courts below that the unlawful strike and related activity were causing irreparable harm. Such harm resulted not only from the loss of services of Petitioners employed by Respondent but also because of the stoppage of delivery of essential goods and services to the schools and disruption of normal class activities. Finally, it should be noted that Petitioners here defied the order, rather than judicially challenging such order.

In view of the above, Respondent contends that *Carroll, supra,* does not apply to the case at bar. See *Board of Education v. Teachers Local 886,* 46 Ill. 2d 439, 264 N. E. 2d 18 (1970), cert. den. 403 U. S. 904 (1971). As the *Carroll* case, *supra,* recognizes, there are situations which justify the issuance of *ex parte* restraining orders of short duration.

It should be noted that Section 211 of the N. Y. Civil Service Law (The Taylor Law) specifically provides:

> Notwithstanding the provisions of section eight hundred seven of the labor law, where it appears that public employees or an employee organization threaten or are about to do, or are doing, an act in violation of section two hundred ten of this article, the chief executive officer of the government involved shall (a) forthwith notify the chief legal officer of the government involved, and (b) provide such chief legal officer with such facilities, assistance and data as will enable the chief legal officer to carry out his duties under this section and, notwithstanding the failure or refusal of the chief executive officer to act as aforesaid, *the chief legal officer of the government involved shall forthwith apply to the supreme court for an injunction against such violation.* (Emphasis supplied.)

Respondent submits that the italicized words embody a legislative mandate that the chief legal officer avail himself of the most prompt procedure in restraining unlawful activity. As was stated by the New York Court of Appeals in *Rankin v. Shanker,* 23 N. Y. 2d 111, 295 N. Y. S. 2d 625, 242 N. E. 2d 802 (1968), a case in which the question presented was whether public employees or the representative unions were entitled, as a matter of right, to a trial by jury in criminal contempt proceedings brought against them for violation of the Taylor Law:

> It is not unreasonable to assume that the Legislature, which prohibited strikes by public employees, would provide every reasonable means for enforcement of that prohibition by giving the courts the powers necessary to bring about their early termination. * * * And, we would add, if called by teachers in the New York City public school system, such strikes would not only deprive children of their fundamental and statutory right to a basic education—thereby severely handicapping them in their efforts to obtain higher education and future

> employment—but it would also impair their respect for law. 23 N. Y. 2d 111 at 117-18, 295 N. Y. S. 2d 625 at 630, 242 N. E. 2d 802 at 806.

See also, *City of New York v. DeLury,* 23 N. Y. 2d 175, 295 N. Y. S. 2d 901, 243 N. E. 2d 128 (1968), appeal dismissed 394 U. S. 455 (1969); *State v. Fuller,* 31 A. D. 2d 71, 296 N. Y. S. 2d 37 (2nd Dep't 1968).

Respondent further relies upon a statement of this Court in *Druggan v. Anderson,* 269 U. S. 36 (1925), which involved the construction of a section of the National Prohibition Act. The Court stated at 40:

> It is argued that the preliminary injunction was void for want of the notice required by Equity Rule 73 and the Act of October 15, 1914, chap. 323, §17, 38 Stat. at L. 730, 737, Comp. Stat. §1243a, 6 Fed. Stat. Anno. 2d ed. p. 139. The statute provides that if it is made to appear that the nuisance exists, a *temporary injunction shall issue forthwith.* §22. In view of the drastic policy of the Amendment and the statute, *we see no reason why the words should not be taken literally to mean what they say.* (Emphasis supplied.)

In view of the overriding governmental interest embodied in the Taylor Law, Respondent submits that the words of this statute should also be read literally, particularly since the speech which was temporarily enjoined was used in direct support of an unlawful strike.

The N. Y. Civil Practice Law and Rules afford ample procedural safeguards against abuse in the issuance of a temporary restraining order. Section 6301 states:

> A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

Section 6314 provides for immediate vacatur or modification, *ex parte,* before either the judge who granted it or, in his absence, another judge. Section 5704 similarly provides that the appellate division or a justice thereof may vacate or modify any such order without notice to the adverse party. As noted above, instead of relying upon these procedural safeguards, Petitioners *defied* the temporary restraining order issued in accordance with the provisions of New York State procedural law.

**Conclusion.**

Respondent respectfully submits that the Court should deny the petition for writ of certiorari upon all of the grounds raised above.

Dated: October 28, 1974.

Respectfully submitted,

A. EDWARD HILL,
Attorney for Respondent,
724 Security Mutual Building,
Binghamton, N. Y. 13901
Telephone: (607) 723-5341.

HINMAN, HOWARD & KATTELL,
Of Counsel,
724 Security Mutual Building,
Binghamton, N. Y. 13901
Telephone: (607) 723-5341.

SHAW, ESWORTHY, O'BRIEN & CROWLEY,
Of Counsel,
123 Front Street,
Binghamton, N. Y. 13905
Telephone: (607) 723-5408.

# APPENDIX.

## APPENDIX A—STATUTORY PROVISIONS

### N. Y. Civil Practice Law and Rules

§6314. Vacating or modifying preliminary injunction or temporary restraining order.

A defendant enjoined by a preliminary injunction may move at any time on notice to the plaintiff to vacate or modify it. On motion, without notice, made by a defendant enjoined by a temporary restraining order, the judge who granted it, or in his absence or disability, another judge, may vacate or modify the order. An order granted without notice and vacating or modifying a temporary restraining order shall be effective when together with the papers upon which it is based, it is filed with the clerk and served upon the plaintiff. As a condition to granting an order vacating or modifying a preliminary injunction or a temporary restraining order, a court may require the defendant, except where the defendant is a public body or officer, to give an undertaking, in an amount to be fixed by the court, that the defendant shall pay to the plaintiff any loss sustained by reason of the vacating or modifying order.